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CHARLES ALVIN CANTLEY
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 366.

THE UNITED STATES, PETITIONER,

v.
BROOKS-CALLAWAY COMPANY,

Brief Opposing the Granting of Petition.

GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
JOHN W. GASKINS,
FRED W. SHIELDS,

Attorneys for Respondents.

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CITATIONS.

Cases:

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Hecht v. Malley, 265 U. S. 144, 153	4
Maryland Dredging Co. v. United States, 241 U. S. 184	4
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No. 366.

THE UNITED STATES, *Petitioner*,

v.
BROOKS-CALLAWAY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE COURT OF CLAIMS.

Opinion Below.

The opinion of the Court of Claims (R. 18-22) is not yet officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered June 1, 1942 (R. 22). Jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented.

Whether the proviso to Article 9 of the contract which provides that a contractor shall not be charged with liquidated damages for any delays due to unforeseeable causes beyond the control and without the fault of the contractor, including acts of God, or of the public enemy, acts of the Government, fires, floods, etc., authorizes the contracting officer to charge liquidated damages for delay to the work resulting from high water which he considered to be foreseeable.

Contract Provisions Involved.

Article 9 of the contract is set forth in the petition for writ of certiorari (pp. 2-4) to which reference is hereby made.

Statement.

The statement of facts contained in the petition for writ of certiorari (pp. 4-6) fairly sets forth the facts of the case.

Summary of Reasons for Denying the Writ.

The writ of certiorari should be denied because:

1. The case does not involve a question of sufficient public importance to justify its consideration by this Court.
2. The decision of the Court of Claims is correct and sound.

Argument.

1. The case does not involve a question of sufficient public importance to warrant consideration by this Court.

The amount involved, \$3,660, is small.

Although petitioner now contends (petition for writ of certiorari pp. pp. 12, 13) that the question is one of great importance involving thousands of Government contracts, its present position is contradicted by its past conduct. Over eight years ago the Court of Claims decided against the petitioner upon the question now presented. *Albina Marine Iron Works v. United States* 79 C. Cls. 714, 722. Petitioner did not then ask for certiorari, and has not considered the question sufficiently important to warrant revision of Article 9 of the standard form of Government contract. It therefore does not become petitioner to complain (petition for Writ of Certiorari, p. 14) that it is now too late to reform contracts which have already been entered into or to introduce saving clauses in the contracts which have been completed and in which claims for liquidated damages have been asserted during the past six years.

Further evidence of the unimportance of the question involved is the fact that, in so far as respondent has been able to

determine, only once before has the question been raised in the many years that the Standard Article 9 has been in force, *Albina Marine Iron Works v. United States, supra.*

2. The decision of the Court below is correct and sound.

In the petition for writ of certiorari (pp. 8-9) it is urged that the term "flood," as used in Article 9, does not include high water which suspends the contract work, and further, that Article 9 does not contemplate the remission of liquidated damages for delay resulting from flood unless the flood was unforeseeable.

It is submitted that these contentions are without merit. In the first place, the determination by the court below (R. 19) that the term "flood" is broad enough to include high water which overflows the banks of the river is reasonable.

Second, well established rules of interpretation support the decision of the court below (R. 19) that under Article 9 of the contract a flood is regarded in and of itself as being unforeseeable.

Article 9 provides that the contractor shall not be charged with liquidated damages for "any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, *including*, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather" (italics supplied). It is clear that by using the word "including" petitioner intended that floods and the other specified causes of delay should be examples of unforeseeable delays for which liquidated damages should not be charged. See *Mortello Salt Co. v. Utah*, 221 U. S. 452. There is no merit to the argument (petition for writ of certiorari, p. 8) that such an interpretation enlarges the general category of unforeseeable causes. Floods, strikes, fires and the other specific causes of excusable delay set forth in Article 9 are by nature unforeseeable with any degree of accuracy, either as to the time of their occurring or as to their consequences. To interpret Article 9 as relieving a contractor from liquidated

damages for delays resulting from such causes does not, therefore, enlarge the general category of "unforeseeable causes."

Only one of the specified causes for relief is qualified in any way. That one is "severe weather," which is qualified by the word "unusually." The absence of qualification of the other causes is a strong indication that they were regarded in themselves as being unforeseeable. The rule of *expressio unius est exclusio alterius* applies.

Even if Article 9 be considered ambiguous, the decision of the court below is correct. It is well established that ambiguous language in a written instrument should be construed against the party preparing it. *The Insurance Companies v. Wright*, 1 Wall, 468; *American Surety Co. v. Pauly*, 170 U. S. 133, 144.

In addition, by failing to petition for certiorari in *Albina Marine Iron Works v. United States*, *supra*, and by failing to revise Article 9 of the Standard Form of Government Contract in the eight years following the decision in that case, petitioner must be considered as having acquiesced in the interpretation then given to Article 9 by the Court of Claims. Cf. *Hecht v. Malley*, 265 U. S. 144, 153.

In the petition for writ of certiorari (pp. 10-11) it is stated that the purpose of the proviso to Article 9 is to restate the general rule of impossibility of performance and to remove any doubt whether the doctrine of impossibility was intended to apply. It is clear, however, that under Article 9, relief from liquidated damages is not based upon the doctrine of impossibility. For example, there is no dispute that a week's delay resulting from a strike or from unusually severe weather would be grounds for an extension of time under Article 9. It can not be seriously contended, however, that such delays would relieve a contractor from performance of his contract under the doctrine of impossibility or that in the absence of Article 9 such causes would excuse delayed performance. *Maryland Dredging Company v. United States*, 241 U. S. 184, cited by petitioner in support of its contention, is not even remotely in point.)

Petitioner also urges (petition for writ of certiorari, pp. 11-12) that the interpretation for which it contends will enable the contractor to estimate more closely both the time within which and the price at which he can perform the contract, and will also give the Government the benefit of a lower bid and the promise of a more prompt performance. This argument is fallacious. Article 9 does not aid the contractor in estimating the time it will take him to complete the work, or in estimating the cost of such work, exclusive of liquidated damages. It merely removes one of the uncertainties, i. e., the risk of being charged liquidated damages for delays of a certain character, which he would otherwise have to take into account in fixing his bid-price. The interpretation requested by petitioner, instead of securing lower bids, would increase the uncertainty of the contractor regarding relief from liquidated damages and would force him to raise his bid to allow for such uncertainty. The contractor's desire to avoid increased overhead costs, together with the threat of liquidated damages which still exists under the interpretation given to Article 9 by the court below, are sufficient to secure prompt performance.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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